Rakesh a/l Ram Tawar v Timbalan Menteri Keselamatan Dalam Negeri, Malaysia & Ors

HIGH COURT (SHAH ALAM) — CRIMINAL APPEAL NO MT(4)–44–1 OF 2008
NALLINI PATHMANATHAN JC
2 MAY 2008

Criminal Procedure — Habeas corpus — Application — Detention under Emergency Ordinance (Public Order and Prevention of Crime) 1969 — First application for habeas corpus dismissed — Second application for habeas corpus on identical facts but different grounds — Preliminary objection — Plea of res judicata — Whether plea of res judicata correctly invoked — Whether res judicata applies to criminal matters and habeas corpus applications

On 13 October 2006, the Deputy Minister of Home Affairs ('the first respondent') issued an order of detention for a period of two years ('the detention order') against Rakesh a/l Ram Tawar, the detainee/applicant ('the applicant'), under s 4(1) of the Emergency Ordinance (Public Order and Prevention of Crime) 1969 ('the Ordinance'). In or around 13 April 2007, the applicant filed an application for the issuance of a writ of habeas corpus in the High Court. In this application the applicant sought relief against two respondents, namely the officer in charge of the detention centre in Simpang Renggam, Johor and the Ministry of Home Affairs rather than the Minister of Home Affairs. By way of this application the applicant challenged the validity of the detention order on the grounds that there was no reasonable or plausible basis for the Minister to issue such a detention order as there was no evidence that the applicant was involved in armed gang robbery. He substantiated this by contending, inter alia, that none of the victims of the crime had identified him; that as he suffered from diabetes, high blood pressure and chronic sinusitis his health would be compromised by his continued detention; and that the detention would preclude him from continuing his education in engineering. The application was heard and dismissed by the High Court and the applicant did not file an appeal against that decision to the Federal Court.

Subsequently on 6 November 2007, the detainee filed this second application for the issuance of a writ of habeas corpus ('the second application'), through different solicitors. In this second application, the applicant had alleged, inter alia, that there had been non-compliance with the provisions of rr 3(2), 5(1) and 5(2) of the Ordinance; that the advisory board failed to comply with the procedure provided in art 15(2) of the Federal Constitution ('Constitution'),

in that the chairman does not possess requisite qualifications; that the provisions of art 5(1) of the Constitution were breached. The respondents had lodged a preliminary objection to this second application contending that this second application ought not to be heard by reason of the application of the principle of res judicata whereby the present proceedings amounted to an abuse of the process of the court. It was the respondents' contention that the proper course to have been adopted by the applicant when his first application was dismissed on 18 October 2007 was to appeal directly to the Federal Court and that the filing of the second application was an attempt by the applicant to attempt to circumvent such an appeal. The respondents therefore sought an order dismissing this second application. In the circumstances, the main issue for consideration by this court was whether the plea of res judicata had been correctly invoked by the respondents.

Held, dismissing the preliminary objection:

(1) Upon a comparison of the first and second habeas corpus applications it was notable that in his first application the applicant had omitted to allude to any allegations of a failure to comply with mandatory procedural requirements under the provisions of the Ordinance or the Constitution. A perusal of the chronology of facts showed that while the factual matrix for the first and second applications were identical, as was the detention order sought to be invalidated, the grounds for the two applications differ. The second application challenged the validity of the detention order on the basis that there was a procedural non-compliance with the provisions of the Ordinance, the Emergency Rules 1972 and the Constitution whereas the first application relied on the ground that there was no evidential basis or reason for the issuance of the detention order. In addition, the three elements required for invoking the plea of res judicata had all been satisfied in this case, in that, the issue of whether the detention of the applicant was unlawful had been definitively settled by judicial decision; there was also a final order dated 18 October 2007 handed down after the first application had been heard on its merits; the parties involved were the same. In the instant case, the applicant had made a second application in respect of the same detention order and this was because he had failed to put forward legal arguments relating to non-compliance with mandatory procedural requirements in the first application. Therefore, prima facie the respondents in this case had pleaded res judicata and an abuse of process correctly (see paras 5–11 & 19).

(2) Section 25(2) of the Courts of Judicature Act 1964 expressly recognises the doctrine of res judicata and provides that it is applicable and relevant in criminal proceedings, including applications for habeas corpus, in as much as it is so in civil proceedings (see para 12).

(3) Although the doctrine of res judicata seeks to exclude or prohibit a litigant from taking up in a subsequent litigation matters which he should properly have advanced in the earlier litigation, there exists an equally clear provision that allows for the non-operation of this doctrine where there are special circumstances which merit such preclusion of the principle. Whereas it is clear that a litigant may be correctly penalised under this doctrine for holding back arguments that could have been made in the first application, the courts had recognised, that in cases where special or exceptional circumstances arise which merit the preclusion of the doctrine then the plea of an abuse of process may be rejected. This is particularly so where the liberty of a person, as in this case, is in issue. From the facts it was clear that the applicant did not 'hold back' arguments that were available to him. In fact, the applicant was prejudiced in his first application by the failure of his first set of solicitors to appreciate the current position of the law. However, this failure could not now be attributed to the applicant as he relied entirely on their legal expertise. As such, the instant case warranted special consideration as the applicant could not be faulted for taking an erroneous legal path in his first application (see paras 16, 19–21).

[Bahasa Malaysia summary

Pada 13 Oktober 2006, Timbalan Menteri Hal Ehwal Dalam Negeri ('responden pertama') telah mengeluarkan satu perintah penahanan untuk tempoh dua tahun ('perintah penahanan tersebut') terhadap Rakesh a/l Ram Tawar, orang tahanan/pemohon ('pemohon') di bawah s 4(1) Ordinan Darurat (Ketenteraman Awam dan Mencegah Jenayah) 1969 ('Ordinan'). Pada atau sekitar 13 April 2007, pemohon telah memfailkan satu permohonan untuk pengeluaran writ habeas corpus di Mahkamah Tinggi. Dalam permohonan ini pemohon memohon relief terhadap dua responden, iaitu pegawai bertugas di pusat tahanan di Simpang Renggam, Johor dan Kementerian Hal Ehwal Dalam Negeri dan bukan Menteri Hal Ehwal Dalam Negeri. Melalui permohonan ini pemohon telah mencabar kesahan perintah penahanan tersebut atas alasan tiada asas munasabah untuk Menteri mengeluarkan perintah penahanan sebegini kerana tidak ada keterangan bahawa pemohon terlibat dalam rompakan berkumpulan bersenjata. Beliau mengesahkan ini dengan menegaskan, antara lain, bahawa tiada seorangpun daripada mangsa jenayah itu yang telah mengecamnya; bahawa disebabkan dia mengalami penyakit kencing manis, darah tinggi dan resdung yang kronik kesihatannya akan terjejas oleh penahanannya yang berterusan; dan

bahawa penahanan tersebut akan menghalangnya daripada menyambung pelajarannya dalam bidang kejuruteraan. Permohonan tersebut telah didengar dan ditolak oleh Mahkamah Tinggi dan pemohon tidak memfailkan rayuan terhadap keputusan tersebut ke Mahkamah Persekutuan.

Kemudian pada 6 November 2007, orang tahanan itu telah memfailkan permohonan kedua ini untuk pengeluaran writ habeas corpus ('permohonan kedua'), melalui peguamcara-peguamcara berbeza. Dalam permohonan kedua ini, pemohon telah mendakwa, antara lain, bahawa terdapat ketidakpatuhan dengan peruntukan kk 3(2), 5(1) dan 5(2) Ordinan; bahawa lembaga penasihat gagal untuk mematuhi prosedur yang diperuntukkan dalam perkara 15(2) Perlembagaan Persekutuan ('Perlembagaan'), di mana pengerusi tidak mempunyai kelayakan yang diperlukan; bahawa peruntukan perkara 5(1) Perlembagaan Persekutuan telah dilanggari. Responden-responden telah membuat bantahan awal terhadap permohonan kedua ini dengan menegaskan bahawa permohonan kedua ini tidak patut didengar atas alasan permohonan prinsip-prinsip res judicata di mana prosiding semasa membentuk penyalahgunaan proses mahkamah. Adalah hujah responden-responden bahawa jalan sewajarnya yang patut digunakan oleh pemohon semasa permohonan pertamanya ditolak pada 18 Oktober 2007 adalah untuk merayu terus ke Mahkamah Persekutuan dan bahawa pemfailan permohonan kedua merupakan percubaan oleh pemohon untuk cuba memintas rayuan sebegini. Responden-responden oleh itu memohon perintah untuk menolak permohonan kedua ini. Dalam keadaan ini, isu utama untuk dipertimbangkan oleh mahkamah ini adalah sama ada rayuan res judicata telah digunakan dengan betul oleh responden-responden.

Diputuskan, menolak bantahan awal:

(1) Dengan membandingkan permohonan-permohonan habeas corpus pertama dan kedua adalah ketara bahawa dalam permohonan pertamanya pemohon telah tertinggal untuk menyentuh tentang apa-apa dakwaan suatu kegagalan untuk mematuhi keperluan prosedur mandatori di bawah peruntukan-peruntukan Ordinan atau Perlembagaan. Penelitian kronologi fakta menunjukkan bahawa meskipun matriks faktual untuk permohonan-permohonan pertama dan kedua adalah sama, dan begitu juga dengan perintah penahanan yang ingin dibuktikan ketidakbenarannya, alasan-alasan untuk kedua-dua permohonan tersebut adalah berbeza. Permohonan kedua mencabar kesahan perintah penahanan atas dasar bahawa terdapat ketidakpatuhan prosedur dengan peruntukan Ordinan, Kaedah-Kaedah Darurat 1972 dan Perlembagaan manakala permohonan pertama bersandarkan kepada alasan bahawa tiada bukti asas atau alasan untuk mengeluarkan permohonan pertama. Tambahan pula, ketiga-tiga elemen yang diperlukan untuk menggunakan rayuan res judicata

kesemuanya telah dipenuhi dalam kes ini, yang mana, isu sama ada penahanan pemohon yang menyalahi undang-undang pasti diselesaikan oleh keputusan kehakiman; terdapat juga perintah muktamad bertarikh 18 Oktober 2007 yang diputuskan selepas permohonan pertama telah didengar atas meritnya; pihak-pihak terlibat adalah sama. Dalam kes ini, pemohon telah membuat permohonan kedua berkaitan perintah penahanan yang sama dan ini adalah kerana dia telah gagal mengemukakan hujah-hujah di sisi undang-undang berkaitan ketidakpatuhan keperluan prosedur yang mandatori. Oleh itu, prima facie responden-responden dalam kes ini telah merayu res judicata dan penyalahgunaan proses dengan betul (lihat perenggan 5–11 & 19).

(2) Seksyen 25(2) Akta Mahkamah Kehakiman 1964 dengan jelas mengenali doktrin res judicata dan memperuntukkan bahawa ia terpakai dan relevan dalam prosiding jenayah, termasuklah permohonan-permohonan untuk habeas corpus, begitu juga dalam prosiding sivil (lihat perenggan 12).

(3) Meskipun doktrin res judicata ingin mengecualikan atau menghalang litigan daripada memulakan perkara-perkara lain dalam litigasi yang mana patut dikemukakan dengan betul olehnya dalam litigasi terdahulu, wujud peruntukan yang jelas membenarkan doktrin ini untuk tidak beroperasi dalam keadaan khas yang mewajarkan halangan prinsip sebegini. Manakala ia adalah jelas bahawa litigan boleh didenda sewajarnya di bawah doktrin ini kerana menangguhkan hujah-hujah yang boleh dibuat dalam permohonan pertama, mahkamah menyedari, bahawa dalam kes-kes di mana keadaan khas atau luar biasa timbul yang memerlukan halangan doktrin itu maka rayuan untuk penyalahgunaan proses boleh ditolak. Terutamanya apabila kebebasan seseorang, seperti dalam kes ini, menjadi isu. Atas fakta, adalah jelas bahawa pemohon tidak 'hold back' hujah-hujah yang sedia ada dengannya. Bahkan, pemohon diprejudiskan dalam permohonan pertamanya oleh kerana kegagalan kumpulan pertama peguamcara-peguamcaranya untuk menyedari kedudukan semasa undang-undang. Walau bagaimanapun, kegagalan ini sekarang tidak boleh dianggap berpunca daripada pemohon kerana dia bergantung sepenuhnya kepada kepakaran undang-undang mereka. Oleh itu, kes ini memerlukan pertimbangan khas kerana pemohon tidak boleh dipersalahkan kerana mengambil langkah perundangan yang salah dalam permohonan pertamanya (lihat perenggan 16, 19–21).]

Notes

For cases on habeas corpus application, see 5(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 2010–2015.

Cases referred to

Lee Kew Sang v Timbalan Menteri Dalam Negeri Malaysia & Ors [2005] 2 MLJ 631 (refd)

Lorrain Esme Osman & A Writ of Habeas Corpus, Re Ad Subjiciendum [1991] 4 CLJ 1260 (refd)

Superintendant of Pudu Prison & Ors v Sim Kie Chon [1986] 1 CLJ 548 (refd)

Tarling, Re [1979] 1 All ER 981 (refd)

Yat Tung Investment Co Ltd v Dao Heng Bank Ltd [1975] AC 581 (refd)

Legislation referred to

Administration of Justice Act 1960 [UK] s 14(2)
Courts of Judicature Act 1964 s 25(2)
Emergency Ordinance (Public Order & Prevention of Crime) 1969 ss 3(2), 4, 4(1), 5(1), 5(2)
Federal Constitution arts 5(1), 151(2)

O Alvinthiren Nair (Alvinthiren & Partners) for the applicant.
Najib bin Zakaria (Deputy Public Prosecutor, Attorney General's Chambers) for the respondents.

Nallini Pathmanathan JC:

[1] On 13 October 2006, the Deputy Minister of Home Affairs ('the first respondent') issued an order of detention against Rakesh a/l Ram Tawar ('the detainee') for a period of two years pursuant to s 4(1) of the Emergency Ordinance (Public Order & Prevention of Crime) 1969 ('the detention order'). The detainee then filed an application for the issuance of a writ of habeas corpus challenging the validity of the detention order, in the High Court at Kuala Lumpur vide application No 44–44 of 2007 ('the first habeas corpus application'). This application was heard and dismissed by the High Court at Kuala Lumpur on 18 October 2007. The detainee did not file an appeal against this decision to the Federal Court.

[2] Subsequently, on 6 November 2007, the detainee filed a second application for the issuance of a writ of habeas corpus in this court in respect of the same detention order through different solicitors ('the second habeas corpus application'). In response to this, the respondents lodged a preliminary objection contending that the second habeas corpus application should not be heard or determined by this court by reason of the application of the principle of res judicata whereby it is argued that the present proceedings amount to an abuse of the process of the court. The respondents contend that the proper course to have been adopted by the detainee when his first application was dismissed on 18 October 2007 should have been an appeal to the Federal Court. The filing of the second habeas corpus application in

this court, it was maintained, amounted to an attempt to circumvent such an appeal. Finally the respondents contend that this court has no jurisdiction to decide on the second habeas corpus application before it because the subject matter of the detainee's complaint lies within the appellate jurisdiction of the Federal Court, and not this court. The respondents therefore seek an order dismissing this second application for habeas corpus at this stage.

THE PLEA OF RES JUDICATA

[3] Res judicata is defined in *Black's Dictionary* as follows:

> res judicata [Latin a thing adjudicated] 1. An issue that has been definitively settled by judicial decision. 2. *An affirmative defense barring the same parties from litigating a second lawsuit on the same claim, or any other claim arising from the same transaction or series of transactions and that could have been — but was not — raised in the first suit. The three essential elements are (1) an earlier decision on the issue, (2) a final judgment on the merits, and (3) the involvement of the same parties, or parties in privity with the original parties.*
>
> Res judicata has been used in this section as a general term referring to all of the ways in which one judgment will have a binding effect on another. That usage is and doubtless will continue to be common, but it lumps under a single name two quite different effects of judgments. *The first is the effect of foreclosing any litigation of matters that have never been litigated, because of the determination that they should have been advanced in an earlier suit.* The second is the effect of foreclosing relitigation of matters that have once been litigated and decided. The first of these, preclusion of matters that were never litigated has gone under the name 'true res judicata' or the names, 'merger' and 'bar'. The second doctrine, preclusion of matters that have once been decided has usually been called 'collateral estoppel'.

[4] The issue that falls for consideration at the outset is whether the plea of res judicata is correctly taken, and if so, which form of the plea applies, ie, whether it is the foreclosure of the relitigation of matters that were taken up and adjudicated upon in the first habeas corpus application or whether it is a preclusion of the litigation of matters that could have been, but were never litigated in the first habeas corpus application. This in turn requires a thorough examination and comparison of the two applications.

THE FIRST HABEAS CORPUS APPLICATION

[5] The first habeas corpus application was filed in or around 13 April 2007. In it, the detainee through his first set of solicitors, sought relief against two respondents, namely the officer in charge of the detention centre in Simpang Renggam, Johor and the Ministry of Home Affairs, rather than the Minister of Home Affairs. In support of the application, a total of two affidavits were filed. In essence, the detainee challenged the validity of the

detention order on the grounds that there was no reasonable or plausible basis or reason for the Minister to issue such a detention order as there was no evidence that the detainee was involved in armed gang robbery. He substantiated this by contending that none of the victims of the crime identified him and he had not been charged in any court albeit in Ipoh, Kulim or Kuantan. Additionally the detainee argued that he suffered from diabetes, high blood pressure and chronic sinusitis and that his health would be compromised by continued detention. The detainee was a student of engineering prior to his detention and the continued detention precluded him from continuing with his education. These grounds, broadly summarised comprised the basis for the first habeas corpus application. It is notable that the detainee in his application has omitted to allude to any allegations of a failure to comply with mandatory procedural requirements under the provisions of the Ordinance or the Federal Constitution.

THE SECOND HABEAS CORPUS APPLICATION

[6] In his second habeas corpus application filed through a different set of solicitors was filed in January 2008. In this second application, the detainee has alleged that there has been non-compliance with the provisions of r 3(2), 5(1) and 5(2) of the Ordinance. It is further contended that the Advisory Board failed to comply with the procedure provided in art 151(2) of the Federal Constitution, in that the chairman does not possess requisite qualifications. He further complains that the provisions of art 5(1) of the Federal Constitution were breached in that the reasons for his detention were never explained to him; neither was he advised that he could be represented by a lawyer. Further issues are pleaded including for example, that the order issued under s 4 is not in compliance with the Ordinance, as well as contraventions of r 6 of the rules and art 151 of the Federal Constitution although these arguments are not ventilated in full in the affidavits.

A comparison of the first and second habeas corpus applications — Does the plea of res judicata apply?

[7] The following is evident from the examination and comparison of the two applications:

(i) The factual matrix comprising the basis for both the first and second habeas corpus applications is the same. It comprises the period from his arrest, remand and final detention pursuant to the order issued by the Deputy Minister;

(ii) The second habeas corpus application challenges the validity of the detention order on the basis that there is procedural non-compliance with the provisions of the Ordinance, the Emergency Rules 1972 and

A the Federal Constitution. The first habeas corpus application relies on the ground that there was no evidential basis or reason for the issuance of the detention order.

B **[8]** The bases or grounds for first and second applications for habeas corpus therefore differ while the factual matrix is identical, as is the detention order sought to be invalidated. This is borne out by a perusal of the chronology of facts.

C **[9]** As such it would appear that the plea of res judicata in the wider sense is relevant in the context of the instant case. The plea is taken in the context that the issues raised in the second habeas corpus application ought to have been advanced and litigated in the first application.

D **[10]** Applying the definition in *Black's Dictionary* it would appear that the three elements have been met:

(i) an issue that has been definitively settled by judicial decision;

(ii) a final judgment on the merits; and

E (iii) the involvement of the same parties or parties in privity with the original parties.

F **[11]** The issue that has been definitively settled by judicial decision is whether the detention of the detainee is unlawful. There is also a final order dated 18 October 2007 handed down after the first habeas corpus application had been heard on its merits. The parties involved are the same.

Is the principle of res judicata applicable to criminal matters and habeas corpus
G *applications?*

[12] Section 25(2) of the Courts of Judicature Act 1964 ('the CJA') which confers additional powers to the High Court as set out in the Schedule to the CJA, expressly recognises the doctrine of res judicata and provides that the
H High Court is empowered to... dismiss or stay proceedings where the matter in question is res judicata between the parties. The doctrine of res judicata should therefore be applicable and relevant in criminal proceedings, including applications for habeas corpus, in as much as it is so in civil proceedings.

I **[13]** The applicability of the principle of res judicata in criminal matters is comprehensively set out in *Superintendant of Pudu Prison & Ors v Sim Kie Chon* [1986] 1 MLJ 494 where Eusoffe Abdoolcader J (as he then was) explained the position thus (at pp 498–499):

... The appellants plead res judicata in this regard and we think the point is well taken and is supported by authority, and we would refer to the pronouncement of the Privy Council in *Hoystead & Ors v Commissioner of Taxation* [1926] AC 155 and a catenation of cases to the like effect, *namely that the plea of res judicata applies, except perhaps where special circumstances may conceivably arise of sufficient merit to exclude its operation, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.*

There is moreover the inherent jurisdiction in cases where res judicata is not strictly established, and where estoppels per rem judicatam has not been sufficiently pleaded, or made out, but nevertheless the circumstances are such as to render a reagitation of the questions formally adjudicated upon a scandal and an abuse, the court will not hesitate to dismiss the action, or stay proceedings therein, or strike out the defence thereto, as the case may require. It would suffice in this regard to refer to the judgment of the Privy Council delivered by Lord Wilberforce in *Brisbane City Council and Myer Shopping Centres Pty Ltd v Attorney-General for Queensland* [1979] AC 411 (at p 425):

> The second defence is one of 'res judicata'. There has, of course, been no actual decision in litigation between these parties as to the issue involved in the present case, but the appellants invoke this defence in its wider sense, according to which a party may be shut out from raising in a subsequent action an issue which he could, and should, have raised in earlier proceedings. The classic statement of this doctrine is contained in the judgment of Wigram V-C in *Henderson v Henderson* (1843) 3 Hare 100 and its existence has been affirmed by this board in *Hoystead v Commissioner of Taxation* [1926] AC 155. A recent application of it is to be found in the decision of the Board in *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd* [1975] AC 581. It was in the judgment of the board, there described in these words: there is a wider sense in which the doctrine may be appealed to, so that it becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings.

[14] Accordingly it follows that any issues of non-compliance with mandatory procedural rules ought to have been advanced and litigated in the first habeas corpus application and that any attempt to do so in the second application would be correctly resisted by a plea of res judicata in the wider sense, unless there exist exceptional or special circumstances of sufficient merit to warrant the exclusion of the operation of the principle.

[15] In the Privy Council decision of *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd* Lord Kilbrandon explained the extent of the principle of res judicata thus:

A ... The second question depends on the application of a doctrine of estoppel, namely res judicata. Their Lordships agree with the view expressed by McMullin J that the true doctrine in its narrower sense cannot be discerned in the present series of actions, since there has not been, in the decision in No 969, any formal repudiation of the pleas raised by the appellant in No 534... *But there is a wider*
B *sense in which the doctrine may be appealed to, so that it becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings*. The locus classicus of that aspect of res judicata is the judgment of Wigram VC in *Henderson v Henderson* (1843) 3 Hare 115, where the judge says:

C

> *... where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matters*
> D *which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case.* The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties,
> E exercising reasonable diligence, might have brought forward at the time.
>
> *The shutting out of a 'subject of litigation' a power which no court should exercise but after a scrupulous examination of all the circumstances is limited to cases where reasonable diligence would have caused a matter to be earlier raised; moreover, although negligence, inadvertence or even accident will not suffice to excuse,*
> F *nevertheless special circumstances are reserved in case justice should be found to require the non-application of the rule...*

(Emphasis added.)

G **[16]** It is apparent from all the foregoing cases on the doctrine of res judicata that notwithstanding the clear power of the court to exclude or prohibit a litigant from taking up in a subsequent litigation matters which he should properly have advanced in the earlier litigation, there exists an equally clear provision allowing for the non-operation of the doctrine where there are
H special circumstances which merit such preclusion of the principle. In *Superintendant of Pudu Prison v Sim Kie Chin* too, this exception to the applicability of the doctrine was expressly recognised by Eusoffee Abdoolcadeer LJ.

I **[17]** In *Re Tarling* [1979] 1 All ER 981 the applicant, as in this case, sought a renewed application for habeas corpus to secure his discharge from prison where he had been committed for return to Singapore where several charges had been brought against him by the Singapore Government. Peter Gibson J set out the position which relates to the position of an applicant who makes

a second application for habeas corpus in respect of the same detention. It should be noted that the position in law in the United Kingdom is specifically provided for by statute in s 14(2) of the Administration of Justice Act 1960. It stipulates expressly that no repeated application for habeas corpus may be made in respect of the same person on the same grounds. While there is no equivalent provision in Malaysia, the Schedule to the Courts of Judicature Act 1964 containing the additional powers of the High Court nonetheless empowers the court to dismiss or stay proceedings where the matter is res judicata between the parties. Accordingly the statement of the law relating to res judicata in *Re Tarling* is relevant. Peter Gibson J in delivering the judgment of the court summarised the position thus:

> ... Before dealing with the questions of jurisdiction it is to be noted that, on two important principles, which bear on the position of an applicant for habeas corpus who seeks to make a second application in respect of the same detention, there is no substantial dispute between the parties in the case.
>
> Firstly it is clear to the court *that an applicant for habeas corpus is required to put forward on his initial application the whole of the case which is then fairly available to him. He is not free to advance an application on one ground, and to keep back a separate ground of application as a basis for a second or renewed application to the court.*
>
> The true doctrine of estoppel known as res judicata does not apply to the decision of this court on an application for habeas corpus; we refer to the words of Lord Parker CJ, delivering the judgment of the court in *Re Hastings* (no 2) nl. There is, however, a wider sense in which the doctrine of res judicata may be applicable, whereby it becomes an abuse of process to raise in subsequent proceedings matters which could, and therefore should, have been litigated in earlier proceedings: see the judgment of the Privy Council (Lord Morris, Lord Cross and Lord Kilbrandon) in *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd* [1975] AC 68. In our judgment, that principle is applicable to proceedings for habeas corpus, whether under the 1967 Act or under the general jurisdiction of the court *although, no doubt, the stringency of the application of the principle* may be different in cases concerning the liberty of the subject from that in cases concerning such matters as disputes on property ....
>
> (Emphasis added.)

[18] It is apparent that the court recognised that there would be cases where matters which should have been raised were not, but when raised in subsequent proceedings would not amount to an abuse of process.

[19] In the instant case, as in *Re Tarling*, the applicant makes a second application in respect of the same detention order. In the first habeas corpus application he could have, but failed to put forward legal arguments relating to non-compliance with mandatory procedural requirements, that he now seeks to do in this second application. Prima facie, the plea of res judicata and

an abuse of process appear to be correctly taken. However it is equally clear that while a litigant may be correctly penalised under this doctrine for holding back arguments that could have been taken in the first application, the courts have recognised, albeit rarely, that in cases where special or exceptional circumstances arise which merit the preclusion of the doctrine, then the plea of an abuse of process may be rejected. This is particularly so where the liberty of a person is in issue, as is the case here.

[20] The question that next arises for consideration is whether the applicant 'held back' the arguments relating to mandatory procedural non-compliance, which he seeks to raise in the present proceedings. As discussed earlier the applicant's first set of solicitors failed to raise any such issues, which if raised and found to be true, would have had some possibility of success. As drafted and put forward, the first application contained no merits warranting the issuance of an order of habeas corpus. This is because the entire basis for the first application was a challenge to the effect that the Minister had exercised his discretion without any basis or any reasonable basis in arriving at his decision to issue the order of detention. The law on this area has been clear, particularly since the decision of the Federal Court in *Lee Kew Sang v Timbalan Menteri Dalam Negeri Malaysia & Ors* [2005] 2 MLJ 631. In that case it was held that with the amendments to the Ordinance, ISA 1960 and DD(SPM) Act 1985 made by Act A740, Act A739 and Act A738 respectively, which came into force on 24 August 1989, challenges to the Minister's detention order under s 4(2) of the Ordinance could only be based on one ground, namely non-compliance with procedural requirements. Accordingly the first application filed by the applicant was misconceived, in that it was premised on legal arguments that were doomed to failure under the law as it stands. To that extent the applicant was prejudiced in his first application by the failure of his first set of solicitors to appreciate the current position in law. From these facts it is also clear that it cannot be said that the applicant 'held back' arguments that were available to him. The fact that his solicitors were not apprised of the current position in law on this issue cannot be attributed to him as he relied entirely on their legal expertise. The question that then arises for consideration is whether, given the somewhat exceptional facts of this case, the application of the doctrine of res judicata should be precluded in this instance.

[21] In *Lorrain Esme Osman & A Writ of Habeas Corpus, Re Ad Subjiciendum* [1991] 4 CLJ 1260, a similar point arose for adjudication when his counsel argued that they had delayed taking a particular legal point available them in a prior application. Lord Justice Russell in delivering the judgment of the court stated, inter alia, as follows:

> ... we are not satisfied that where an applicant follows an arguable though erroneous legal path as recommended by his advisers, his late raising of an argument previously open to him should necessarily amount to an abuse of process of the type contemplated by Gibson J. In the special circumstances of this case therefore we do not hold that there was any abuse of process.

[22] The instant case also warrants special consideration as the applicant cannot be faulted for taking an erroneous legal path in his first application. He cannot be said to have 'held back' legal arguments for use in a subsequent application. This application relates to the applicant's liberty and therefore also requires careful consideration. On the special and exceptional facts of this case therefore it appears that there is no abuse of process in the filing of the second habeas corpus application. The preliminary objection is therefore dismissed.

Preliminary objection dismissed.

Reported by K Nesan